MUTHURAMA KESAVARAJAH

v.

THE QUEEN

HIGH COURT, AUSTRALIA
MASON CJ, DEANE, DAWSON,
TOOHEY & GAUDRON JJ.
[F.C. 94/036]
27 SEPTEMBER 1994

CRIMINAL PROCEDURE: Charge of conspiring to import heroin - Prosecutor raising question of accused's fitness to plead - Trial Judge ruling that there was no serious question to be tried after hearing medical evidence - Question of fitness to be tried being raised on two other occasions - Judge proceeding with trial - Accused found guilty - Appeal against Judge's ruling.

The appellant was charged with two counts of conspiring to import heroin and conspiring to traffic in heroin. When the matter first came before the Court, the prosecution raised the question of the appellant's fitness to plead based on a report prepared by a doctor of the Forensic Psychiatry Unit who had examined the appellant. The doctor was of the opinion that the appellant showed evidence of an acute psychotic process and was not fit to plead. The prosecution called further evidence in the form of a consultant psychiatrist who examined the appellant the day before the trial and who confirmed that the appellant was psychotic but nevertheless opined that the appellant was in remission and fit to plead. The consultant, however, further stated that the appellant was at risk of a more extensive breakdown again if sufficiently stressed.

The learned Judge accepted the opinion of the consultant psychiatrist and ruled that there was not a serious question as to the appellant's fitness to be tried and that there was no occasion to empanel a jury to determine that question. During the course of the trial, the question of fitness was raised on two further occasions. On the first such occasion the Judge indicated that there was no reason to reconsider his earlier ruling as to the appellant's fitness to be tried and on the second occasion, the trial Judge concluded that, as the trial was virtually over, there was no need to deal with the question.

The appeal to the Court of Criminal Appeal was dismissed on the grounds that there was no injustice to the appellant. The appellant appealed further.

Held:

[1] In the context of a trial, fitness to be tried is to be determined by reference to the factors mentioned by Smith J. in *Reg v. Presser* and by reference to the length of the trial. It makes no sense to determine the question of fitness to be tried by reference to the accused's condition immediately prior to the commencement of the trial without having regard to what the accused's condition will or is likely to be during the course of the trial.

[2] In the present case the learned Judge did not advert to the possibility that the appellant's psychosis might flare up under stress during the course of what was going to be a very long trial, although the consultant psychiatrist had adverted to such a possibility. In the circumstances, the learned Judge's failure to empanel a jury, at the commencement of the trial, to determine the question of the appellant's fitness to be tried was an error.

[3] The appellant's submission, presented towards the conclusion of the trial, coming on top of all the material which had accumulated since the commencement of the trial relating to the appellant's condition, was enough to indicate that the appellant's unstable psychotic condition might well have become the subject of a "flare-up" rendering him unfit to be tried.

[4] Consequently, at this late stage of the trial, a serious question as to the appellant's fitness to be tried again arose. Section 393(1) of the Crimes Act 1958 (Vict.) (the Act) clearly provides that once the trial has begun, any question of fitness to be tried is to be determined by "the jury charged with such indictment or presentment". In the circumstances, the learned Judge should have instructed the jury to determine the question of the fitness of the appellant notwithstanding the fact that the trial was almost over.

[5] The Court of Criminal Appeal's application of the proviso to s. 568 of the Act, on the grounds that no miscarriage of justice took place, cannot be supported. It is plain that a failure to comply with the requirements of s. 393 of the Act is not capable of remedy by recourse to the proviso of s. 568. The object of s. 393 is to ensure that a person who is unfit to be tried should not be subjected to a trial resulting in the risk of his or her conviction and the proviso is not directed to such a situation.

Per Deane and Dawson JJ.

We are unable to agree that, in trying the question of an accused's fitness to plead or fitness to be tried, a jury may take into account the future, as well as the present condition of the accused. To take into account the accused's prospects in that regard in deciding whether to proceed, even if it raised a question which could properly be left to the jury, would be a radical departure from accepted practice, which is to determine the accused's fitness at the time when the question arises. An accused who is fit to plead and to be tried has a right to be tried and cannot be deprived of that right by a prediction as to his or her future mental state.

[Appeal allowed. Conviction quashed. New trial ordered].

Cases referred to:
Allen, Kesavarajah & Moses [1993] 66 A Crim R 376 ***(refd)***
Reg v. Southey [1865] 4 F & F 864; 176 ER 825 ***(refd)***
Reg v. Presser [1958] VR 45 ***(refd)***
Reg v. Judge Martin; Ex parte Attorney-General [1973] VR 339 ***(refd)***
Reg v. Khallouf [1981] VR 360 ***(refd)***
R v. Pritchard [1836] 7 Car & P 304; 173 ER 135 ***(refd)***
R v. Stafford Prison (Governor); Ex parte Emery [1909] 2 KB 81 ***(refd)***
R v. Dashwood [1943] 1 KB 1 ***(refd)***
Reg v. Beynon [1957] 2 QB 111 ***(refd)***
Sinclair v. The King [1946] 73 CLR 316 ***(refd)***
Ngatayi v. The Queen [1980] 147 CLR 1 ***(refd)***
Reg v. Podola [1960] 1 QB 325 ***(refd)***
Reg v. Berry [1876] 1 QBD 447 ***(refd)***
R v. Frith [1790] 22 How St Tr 307 ***(refd)***
R v. Gibbons [1947] 1 DLR 45 ***(refd)***
Reg v. Keary [1878] 14 Cox CC 143 ***(refd)***

Legislation referred to:
Crimes Act 1914 (Cth.), ss. 16, 20B(2), (3)(b), (5), (7)(c), BA(1) to (5), BB, BC, BD, BE
Crimes Act 1958 (Vict), s. 393(1), (2)
Criminal Code (Q), ss. 613, 645
Criminal Code (Tas), ss. 357, 380
Criminal Code (WA), ss. 631, 652
Criminal Law Consolidation Act 1935 (SA), ss. 293, 568
Customs Act 1901 (Cth), s. 233B(1)(cb)
Judiciary Act 1903 (Cth), ss. 68(1), 79
Mental Health (Criminal Procedure) Act 1990 (NSW), s. 11A
Criminal Lunatics Act 1800 (39 & 40 Geo III c. 94), s. 2 (UK)

Other sources referred to:
Pleading, Evidence and Practice in Criminal Cases, Archbold, 1993 Edn. at 4-158
Mental Disorder and Criminal Law in Australia and New Zealand, Campbell, (1988), Ch. 7
Crime and Insanity in England, Walker, (1968), Vol. 1, Ch. 14

For the appellant - Paul B. Connor
For the respondent - M. Rozenes QC, Commonwealth Director of Public Prosecutions

JUDGMENT

Mason CJ, Toohey & Gaudron JJ:
The appellant was tried in the County Court at Melbourne on an indictment containing two counts. The first count alleged that the appellant and three others conspired to import heroin. The second alleged that the appellant and two others conspired to traffic in heroin. The jury returned a verdict of guilty against the appellant and one Allen on the first count. The appellant was acquitted on the second count.

On 30 January 1992, before the trial commenced, prosecuting Counsel raised with the Judge a question which Counsel identified as the appellant's "fitness to plead". After reading a report by Dr. Arul, hearing evidence from Dr. Walton concerning the appellant's mental condition and hearing submissions from the prosecutor, the Judge ruled that there was not a serious question as to the appellant's fitness to be tried and that there was no occasion to empanel a jury to determine that question. The appellant then pleaded not guilty and the trial was adjourned to 10 February 1992 when the appellant was represented by Counsel, who continued to represent him until the closing stages of the trial.

The question of fitness was subsequently raised on two occasions during the course of the long trial. On the first such occasion, the trial Judge indicated that there was no reason for him to reconsider his earlier ruling as to the appellant's fitness to be tried. On the second occasion, near the end of the trial, the trial Judge concluded that, as the trial was virtually over, there was no need to deal with the question.

The appellant applied for leave to appeal against his conviction to the Court of Criminal Appeal on a number of grounds including the ground that the trial Judge erred in law in permitting the trial to continue after a clear issue of the appellant's fitness to plead had arisen and in failing to determine the issue and discharge the jury when the issue subsequently arose during the course of the trial. The Court of Criminal Appeal dismissed the application (*Allen, Kesevarajah & Moses* [1993] 66 A Crim R 376 at 403). The appellant now appeals to this Court, the grounds of appeal being confined to the questions relating to fitness to plead and fitness to be tried. The trial Judge rightly dealt with the issue as one of fitness to be tried. The prosecutor and the appellant's legal

representatives seem to have used fitness to plead and fitness to be tried as if they were interchangeable (The use of the terms interchangeably, while not accurate, is not uncommon: see, for instance, the discussion in Archbold, **Pleading, Evidence and Practice in Criminal Cases,** (1993 edn.) at 4-158 under the heading "Defendant unfit to plead or take his trial". There is a learned discussion of the common law concerning insanity at the time of plea or thereafter and earlier English statutes bearing on the matter in the notes to *Reg v. Southey* [1865] 4 F & F 864 [176 ER 825]).

The trial

When the matter first came before the Court on 30 January 1992, the appellant was unrepresented. He had earlier terminated his Counsel's retainer. The prosecutor informed the Court that Dr. Arul of the Forensic Psychiatry Unit had examined the appellant at Melbourne Remand Centre on 21 January and had prepared a report dated 23 January 1992 addressed to the Director of Public Prosecutions. The report was shown to and read by the appellant who agreed that the Judge should read it as it was "very entertaining". In the report, Dr. Arul referred to the appellant's inappropriate behaviour and to "his disturbed mental state". The report went on to say of the appellant:

> He presented as being quite irritable and grandiose. He stated that he was the re-incarnation of the God [Vishnu], and that he could control the sun and the planets. He appeared to have grandiose delusions and his mood appeared to be elevated. He was disorientated in time, place and person. His attention and concentration span appeared to be impaired. Mr. Kesevarajah was unable to comprehend why he was in Pentridge.
>
> It is my opinion that Mr. Kesevarajah shows evidence of an acute psychotic process, with delusions of grandeur, irritability and elevated mood.
>
> I am of the opinion that, currently, Mr. Kesevarajah is **not** fit to plead, and that his Court case should be adjourned, pending further psychiatric evaluation.

The prosecutor further informed the Court that, as a result of Dr. Arul's report, the Crown had arranged for Dr. Walton, a consultant psychiatrist of thirteen years' experience, to examine the appellant on the previous afternoon. Dr. Walton was then called as a witness for the purpose of the Judge deciding whether there was a serious question to be tried by a jury concerning the appellant's fitness to plead or to be tried. Dr. Walton stated that he was familiar with the test governing fitness to plead enunciated by Smith J. in *Reg v. Presser* [1958] VR 45. The legislation which Smith J. had to consider referred to a finding of insanity "so that such person cannot be tried upon such presentment", not of unfitness to plead, and that he had examined the appellant with a view to ascertaining whether he was fit to plead according to that test. Dr. Walton had read Dr. Arul's report. The opinion of Dr. Walton was expressed in the following question and answer:

> What was the result of your examination of [the appellant] yesterday?
> Your Honour, I believe this man does remain deluded. He exhibits rather grandiose, cosmological and religiose delusions but I think, as you've experienced yourself this morning in conversation with him, Your Honour, he remains quite capable of logical, rational thinking and despite the fact that he might be described or diagnosed as being psychotic I believe that he meets all the elements that are specified in the *Presser* test and therefore he could be described as sick but remaining fit. I might - if I might just add to that, Your Honour. I'm really not disagreeing with what Dr. Arul has said because I had the opportunity to view this man's prison medical records and it is apparent there has been quite a dramatic improvement in his behaviour over the last few days. So it may well have been the case that he was unfit a week ago and that he's not today. That has

a some significance, of course, Your Honour, in that it indicates that perhaps his condition is unstable and even if the question of fitness is resolved, one way or another, today, it may become a live issue again, say, in a few days' time.

He went on to say that the appellant was able to understand what he was charged with, to plead to the charge, to exercise his right of challenge, to understand the nature of the proceedings, and to articulate his defence and his version of the facts to the Court. Dr. b Walton thought that the appellant's attention and concentration span had improved, these being matters that had been of some concern to Dr. Arul.

Dr. Walton gave the following answers to questions put by the Judge:

Your view of the psychosis - I think you say he may well be subject to a psychosis - is that it is an underlying or ongoing condition, I take it?
c I suspect that it has been there, shall I say, quietly for some time, Your Honour, and it has flared up very recently with more florid disturbance and that has now abated again, but clearly he will remain at risk of a rather more extensive breakdown again if sufficiently stressed.

I take it that various stresses, including probably as a major matter the impending Court proceedings and so forth, are the sort of things that could operate as a trigger?
d Indeed, and it may well be no coincidence that this flare-up has occurred when it has.

I suppose I could take your view as being that the psychosis or the condition - however it be properly termed - is an ongoing thing and that he may well be, and probably would be, unfit to be tried at a time when there were florid outbreaks of the condition?
Yes.

But that he would be fit to be tried at any time when it is in remission, as it were?
e In relative remission as it now is; that's correct.

In response to a question by his Honour, Dr. Walton stated that Largactil, an anti-psychotic medication, had been prescribed for the appellant but that he had taken little or none of it. Dr. Walton went on to say:

f It is the right medication but he's not having it anyway, which is of some concern to me, I might add, in terms of his perhaps going the distance in the trial.

Before calling Dr. Walton, the prosecutor stated that Dr. Arul was on stand-by and that it might be necessary to allow him to assess the appellant again in order to give an up-to-date assessment in evidence. The prosecutor also informed the Judge that he understood that Dr. Arul had instructed the prosecutor's solicitor that "things may have g changed" between the dates of the two examinations and "if Dr. Walton had found that he was fit to plead then so be it". Later, the prosecutor stated that Dr. Arul would "bow to Dr. Walton's opinion as to [the appellant's] present condition". However, the prosecutor did not say that Dr. Arul had seen Dr. Walton's report or that he had discussed the matter with Dr. Walton.

After an exchange with the prosecutor about the course which he should take in the light h of the evidence, an exchange in which the appellant played no part, the Judge said:

Mr. Kesevarajah, in discussion with [the prosecutor], indicated the view that I do not think contrary to what I thought when I started off this morning - I thought there must be a serious issue to be tried; but having heard Dr. Walton, I do not think there is. I think the future has to take care of itself, but the present, today seems to be that you are as fit to be tried as you need be and I think it would be a waste of time in effect, and improper
i to express any different view and to empanel a jury.

To this the appellant responded "I totally agree". At no time did the appellant assert that he was unfit to be tried.

On 30 April 1992, the appellant gave unsworn evidence in his defence. On 5 May Counsel for the co-accused Khoosal indicated that he wished to call evidence from Dr. Walton of the appellant's unstable condition which, if accepted, would tend to support Khoosal's innocence. Dr. Walton gave evidence on the *voir dire* stating that the appellant "hinted that he had supernatural powers and these included telepathic powers, he could influence other people, including the Court proceedings". The trial Judge rejected the evidence as irrelevant. The effect of the *voir dire* evidence was to place before the Judge up-to-date medical evidence of the appellant's condition. But his Honour did not consider that there was any reason to reconsider his earlier ruling on the appellant's fitness to be tried. The appellant does not challenge the correctness of that decision.

The appellant's fitness next arose on 25 May, the 58th day of the trial, when the Judge had almost concluded his charge to the jury. The charge had commenced on 18 May. Counsel for the appellant informed the Judge that Dr. Walton was coming to see his client that morning. Counsel said that his client had "some pretty strong views about what should be done, at this stage of the trial", which were "certainly unusual, to put it mildly", and that it would be impossible for Counsel to continue to act for him. Counsel declined to act on the Judge's suggestion that he could take exceptions to the directions in the interest of the appellant in the capacity of *amicus curiae*. Later that day, after Dr. Walton had seen the appellant, Counsel informed the Judge that he and his instructing solicitors would be withdrawing from the case and that the appellant did not require their services any longer. Counsel further told the Judge that the appellant would be receiving some treatment from Dr. Walton. Counsel then withdrew. The trial Judge did not call for any report from Dr. Walton or require him to give further evidence.

On the following day, a note, considered by all to be in the handwriting of the appellant, found its way into the hands of Counsel for one of the co-accused. The note read:

> I sacked Mr. Bey (the appellant's Counsel) today. I have instructions from the aliens that I have to become 'Lord Vishnu' again. I have travelled beyond and had just returned to earth.

The Judge was informed of the existence of the note but did not read it. He was made aware that the contents of the note bore on the appellant's fitness to be tried.

On the next day, 27 May, the prosecutor told the Judge that "various things have filtered through to me which raised questions as to (the appellant's) fitness at the moment". Only a few pages of the Judge's charge to the jury then remained to be delivered. The charge was completed. No exceptions to it were taken by or on behalf of the appellant. His Honour's reaction to the developments that took place between 25 and 27 May was perhaps best expressed in the following comment he made on 27 May:

> As to whether the Court can proceed, I would have thought obviously it could, because at this stage, I think as I said at an earlier stage the matter would go to verdict even if an accused were not here. I mean the thing is virtually over.

His Honour went on to say:

> It is just a matter, and there is nothing really for him to attend to.

The Court of Criminal Appeal

The Court of Criminal Appeal (Phillips CJ, Crockett and Marks JJ.) approached the matters on the footing that "if there is material that invites inquiry as to an accused's fitness either to plead or (if the trial has commenced) to be tried, the Judge is under an obligation to determine if there is 'a real and substantial question' as to such fitness" ([1933] 66 A Crim R at 396). They considered that the trial Judge had applied the correct principles of law in reaching the conclusion that the appellant was fit to plead. Their Honours pointed out that it is important to keep two matters separate, namely, a finding as to whether a real and substantial question as to fitness exists (which is for the Judge to make) and a finding as to whether the accused is or is not unfit (which is for a jury to make). In the instant case, the trial Judge was concerned to deal with the first question on 30 January 1992. The Court of Criminal Appeal considered that there was some force in the appellant's argument that the trial Judge's ruling on that day disclosed judicial error. Indeed, their Honours thought that, had the material consisted only of Dr. Arul's report and Dr. Walton's evidence, there would have been much to be said for the appellant's challenge to the ruling. However, their Honours considered that the trial Judge was entitled to act on the basis of Dr. Arul's response to Dr. Walton's evidence, notwithstanding that the evidence of that response was hearsay. No objection to the evidence was made on that ground. The Court concluded that, although another Judge may have reached a different conclusion, the trial Judge was entitled to reach the result he reached.

With respect to what occurred towards the end of the trial, the Court rejected a submission that the trial Judge did not address his mind to the question of the appellant's fitness to be tried, stating that, by implication, the Judge was of the opinion that there was no real or substantial issue to be tried. The Court went on to say that, if it was wrong on that point, it was disposed to think that, if the Judge had addressed the point, he would have reached a conclusion adverse to the appellant.

In any event, the Court considered that, if there was a real or substantial issue as to the appellant's fitness to be tried, his loss of the prospect of obtaining a favourable verdict on that issue did not give rise to a substantial miscarriage of justice. The basis of this view was that, in this respect, the trial was not so irregular that no proper trial took place. No part of the trial remained other than the completion of the charge and the verdict when the appellant's mental deficiency began to appear at the end of the trial. There was no evidence that the appellant failed to understand the nature of the proceeding or was unable to make his defence. And, in the Court's view, as a layman, he could not reasonably be expected to take exceptions to the Judge's charge. Moreover, the directions given to the jury were not open to objection in so far as they affected the appellant. In the result, there was, in the view of the Court, no injustice to the appellant.

The statutory provisions

The first count in the indictment alleged an offence contrary to s. 233B(1)(cb) of the Customs Act 1901 (Cth); the second alleged an offence under the law of Victoria. It is therefore necessary to take account of the relevant provisions of Commonwealth and State law.

The Crimes Act 1914 (Cth) contains provisions with respect to the determination of the fitness of a person charged to be tried and with respect to the consequences of such a

determination. Where a Court "before which a person appears in proceedings for trial of a federal offence on indictment" finds the person charged unfit to be tried, the Court must determine whether there has been established a *prima facie* case that the person committed the offence (s. 20B(3)(b). The language of the paragraph is wide enough to include a finding of unfitness to be tried at any time during the trial.). The expression "unfit to be tried" is defined to include "unfit to plead" (s. 16). Where, in such a case, a Court finds a person unfit to be tried, the Court may order the person to be detained in prison or hospital for so long only as is reasonably necessary to allow the Court to determine whether it will make an order under s. 20BA dismissing the charge or an order under s. 20BB detaining the person in prison or hospital or granting the person bail (s. 20B(5)). Where the Court determines that a *prima facie* case has not been established, the Court must dismiss the charge and order the release of the person from custody (s. 20BA(1)). Likewise, the Court must make a similar order where it determines that, notwithstanding that there is a *prima facie* case, it is inappropriate to inflict any punishment after having regard to certain matters (s. 20BA(2)).

Where the Court determines that there is a *prima facie* case but does not dismiss the charge:

> the Court must, as soon as practicable after making that first-mentioned determination, determine whether, on the balance of probabilities, the person will become fit to be tried, within the period of 12 months after the day the person was found to be unfit to be tried (s. 20BA(4)).

Such a determination shall not be made unless:

> the Court has obtained, and considered, written or oral evidence from a duly qualified psychiatrist and one other duly qualified medical practitioner (s. 20BA(5)).

There follow sections which provide what is to happen when a person charged with an offence is found to be likely to be fit to be tried within 12 months (s. 20BB) and, conversely, when the person charged is found not to be likely to be fit within 12 months (s. 20BC). There are further provisions requiring the Attorney-General to review detention (s. 20BD) and authorizing the Attorney-General to order release from detention (s. 20BE).

The Commonwealth Act does not make provision for the manner in which the issue of fitness to be tried is to be determined. However, s. 68(1) of the Judiciary Act 1903 (Cth) makes applicable to persons who are charged with offences against the laws of the Commonwealth the laws of a State or Territory respecting the procedure for trial of persons charged with offences and their conviction. And s. 79 of the Judiciary Act provides that the laws of each State, including laws relating to procedure, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State in all cases to which they are applicable.

The relevant Victorian provision is s. 393 of the Crimes Act 1958 (Vict). Section 393 provides:

> (1) If any person indicted or presented for any indictable offence is insane and is upon arraignment so found by a jury lawfully empanelled for that purpose so that such person cannot be tried upon such indictment or presentment, or if upon the trial of any person so indicted or presented such person appears to the jury charged with such indictment

a or presentment to be insane, it shall be lawful for the Court before whom any such person is brought to be arraigned or tried as aforesaid to direct such finding to be recorded; and thereupon to order such person to be kept in strict custody until the Governor's pleasure shall be known. And if any person who has been charged with any indictable offence is brought before any Court to be discharged for want of prosecution and such person appears to be insane, it shall be lawful for such Court to order a jury to be empanelled to try the sanity of such person; and if the jury so empanelled finds such person to be b insane, it shall be lawful for the Court to order such person to be kept in strict custody in such place and in such manner as to such Court seems fit until the Governor's pleasure is known. And in all cases of insanity so found the Governor may by order direct that he be kept in safe custody during the Governor's pleasure in the place designated in the order or in such other place as a person or authority designated in the order may from time to time determine.

c (2) Instead of making an order under sub-section (1) the Court after having regard to any evidence before the Court relating to the person's mental health or intellectual disability may make such order as it thinks fit to enable the person to receive appropriate services under the Mental Health Act 1986 or the Intellectually Disabled Persons' Services Act 1986.

d The language of sub-section (1), namely, "upon arraignment" and "upon the trial", is apt to include the issue of fitness to be tried arising at any stage of the proceedings.

The relationship between the statutory provisions and their application in the present case

e The trial Judge appears to have proceeded on the footing that s. 393 alone governed the question which arose before him for decision at the commencement of the trial. How his Honour came to that conclusion is by no means clear. The first count in the indictment, on which the appellant was found guilty, alleged an offence against a law of the Commonwealth. In relation to that count, the provisions of s. 20B(3) and (5) and the succeeding provisions of the Commonwealth Act had a potential application if the Court had determined that the appellant was unfit to be tried.

f The Commonwealth Act does not prescribe a procedure for determining whether an accused person is fit to be tried except in so far as it relates to a Court finding a person charged unfit to be tried. These references are capable of being understood as references to a finding in conformity with the procedure prescribed by the law of a State in accordance with ss. 68 and 79 of the Judiciary Act.

g Whether the references should be so understood depends upon the meaning of the word "Court" in the expression "where a Court finds" in s. 20B(3) and (5). The word may mean the Court consisting of both Judge and jury, the Judge or the jury. In the context of a finding or decision, the word would ordinarily connote a finding or decision by that part of the Court in which authority to make the finding or decision is reposed. And, in the context of a finding, one would expect the reference to relate to the tribunal of fact, namely the jury, in the case where the Court comprises Judge and jury. So understood, h the references in s. 20B(3) and (5) are compatible with ss. 68 and 79 having an operation which picks up so much of s. 393 as is not inconsistent with the Commonwealth's legislation and makes it applicable to trials of offences against a law of the Commonwealth.

i On the other hand, there is the argument that other reference to "the Court", in particular the reference in s. 20B(3) to the Court determining whether a *prima facie* case

has been established and the reference in s. 20B(5) to the Court making an order detaining the person charged in prison or hospital, plainly relate to the Judge and not the jury. Other references to "the Court" in ss. 20B(7)(c) and 20BA(1), (2) and (3) plainly refer to the Judge. Less clear are the references to "the Court" in s. 20BA(4) and "a Court" in ss. 20BB and 20BC, though it does seem that these references probably refer to the Judge rather than the jury. Once that is accepted, it provides some support for the view that the critical references in s. 20B(3) and (5) relate to the Judge also. That is because consideration of symmetry and consistency suggest that, if the Judge is to decide the question of fitness or unfitness within 12 months, it is for the Judge also to decide the initial question of fitness or unfitness to be tried.

However, notwithstanding that it seems that it is for the Judge to decide the questions arising under s. 20B(2) and ss. 20BB and 20BC, in our view s. 20B(3) and (5) are capable of being read as referring to the jury on the basis that ss. 68 and 79 pick up and make applicable the relevant provisions of State law. To our mind, that is the preferable approach. Historically, fitness to plead and to be tried has been a question determined by a jury (Walker, **Crime and Insanity in England,** (1968), Vol. 1, Ch. 14; Campbell, **Mental Disorder and Criminal Law in Australia and New Zealand,** (1988), Ch. 7. Viewed against that background, s. 20B is not aptly expressed to manifest an intention to commit the making of the decision to the Judge rather than the jury). Further, consideration of State legislation shows that this is still the position (Mental Health (Criminal Procedure) Act 1990 (NSW), s. 11, though the question may be determined by a Judge, at the election of the accused: s. 11A; Crimes Act 1958 (Vict), s. 393; Criminal Code (Q), ss. 613, 645; Criminal Code (WA), ss. 631, 652; Criminal Code (Tas), ss. 357, 380; Criminal Law Consolidation Act 1935 (SA), s. 293). In those circumstances, it could be expected that the Commonwealth would make clear any intention to prescribe a different approach in the case of Commonwealth offences.

The result of this interpretation is that, in relation to proceedings for an offence against a law of the Commonwealth, the provisions of the State law must necessarily give way to the specific provisions of the Commonwealth Act to the extent of any inconsistency. The consequence would be that State law would regulate the mode of determination of fitness to be tried, i.e., by jury in Victoria pursuant to s. 393, but the consequences flowing from the determination would be regulated by Commonwealth law.

It follows that, in the present case, the question of the fitness of the appellant to be tried, which arose at the commencement of the trial, was governed by the provisions contained in s. 393, subject, in relation to the first count, to the application of the relevant provisions of the Commonwealth Act.

The operation of s. 393

It is well established that when, before a trial begins, the question arises as to the mental fitness of the accused to stand his or her trial, it is the Court's duty to determine the accused's fitness to be tried notwithstanding that neither the prosecution nor the defence seeks such an inquiry (*Reg v. Presser* [1958] VR 45; *Reg v. Judge Martin; Ex parte Attorney-General* [1973] VR 339; *Reg v. Khallouf* [1981] VR 360; *R v. Pritchard* [1836] 7 Car & P 3-4 [173 ER 135]; *R v. Stafford Prison (Governor); Ex parte Emery* [1909] 2 KB 81; *R v. Dashwood* [1943] 1 KB 1; *Reg. v. Beynon* [1957] 2 QB 111). In conformity with the opening words of s. 393, which are based on the language of s. 2 of the Criminal Lunatics Act 1800 (39 & 40 Geo III c. 94), that question is to be determined by a jury

specifically empanelled for that purpose. In *Sinclair v. The King* ([1946] 73 CLR 316 at 334), Dixon J. pointed out that:

> [i]t does not seem to have been noticed by the textwriters how high a degree of intelligence this test [i.e., the test of insanity] might demand if it were literally applied.

However, it has long recognized that, in a context such as s. 393, the word "insane" does not mean "insane in the colloquial sense" (*Presser* [1958] VR at 48.) or "insane within the M'Naughten Rules" (*Ngatayi v. The Queen* [1980] 147 CLR 1 at 7 per Gibbs, Mason and Wilson JJ. citing *Reg v. Podola* [1960] 1 QB 325 at 353.). In England, the Courts have always applied Alderson B.'s interpretation in *R v. Pritchard* of s. 2 of the Criminal Lunatics Act, namely, that ([1836] 7 Car & P at 304 [173 ER at 135]; see *Reg v. Berry* [1876] 1 QBD 447 sy 450; *R v. Stafford Prison (Governor); Ex parte Emery* [1909] 2 KB at 85-86; *Reg v. Podola* [1960] 1 QB at 353.):

> the question is, whether the prisoner has sufficient understanding to comprehend the nature of this trial, so as to make a proper defence to the charge.

In the context of s. 393, the word signifies inability, by reason of some physical or mental condition, to follow proceedings of the trial and to make a defence in those proceedings (*Ngatayi* [1980] 147 CLR at 9). Thus, it has been said that the test needs to be applied "in a reasonable and commonsense fashion" (*Presser* [1958] VR at 48; *Ngatayi* [1980] 147 CLR at 8). The test looks to the capacity of the accused to understand the proceedings and, in some cases, complete understanding may require intelligence of quite a high order (*Ngatayi* [1980] 147 CLR at 8). But it does not mean that the accused is required to have sufficient capacity to make an able defence (*Presser* [1958] VR at 48; *Ngatayi* [1980] 147 CLR at 8).

In *Reg v. Presser*, Smith J. elaborated the minimum standards with which an accused must comply before he or she can be tried without unfairness or injustice ([1958] VR at 48). Those standards, which are based on the well-known explanation given by Alderson B. to the jury in *R v. Pritchard* ([1836] 7 Car & P at 304 [173 ER at 135].), require the ability (1) to understand the nature of the charge; (2) to plead to the charge and to exercise the right of challenge; (3) to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged; (4) to follow the course of the proceedings; (5) to understand the substantial effect of any evidence that may be given in support of the prosecution; and (6) to make a defence or answer the charge.

The question whether the accused is fit to be tried is a matter that can be raised by the prosecution as well as the accused (*Reg v. Podola* [1960] 1 QB at 349). It may also be raised by the Judge (*R v. Frith* [1790] 22 How St Tr 307). Although s. 393 is not as specific as s. 631 of the Criminal Code (WA), which requires a jury to be empanelled for the determination of the issue "if it appears to be uncertain, for any reason, whether [the accused] is capable of understanding the proceedings at the trial" (*Ngatayi* [1980] 147 CLR at 9), it cannot be doubted that, in the context of s. 393, "[o]nce a real question as to incapacity is raised, the Judge must follow the procedure laid down in the section." (*ibid.*) Sometimes the test has been stated in terms of whether there is a reason to doubt the accused's fitness to stand trial (*R v. Gibbons* [1947] 1 DLR 45 at 49). However, the Judge should leave the issue to be tried by the jury unless no reasonable jury, properly instructed, could find that the accused was not fit to be tried.

The trial Judge's ruling at the beginning of the trial

It follows that the initial question for our determination is whether the trial Judge should have empanelled a jury and left the issue to the jury instead of ruling that no reasonable jury, properly instructed, could find that the accused was unfit to be tried. We share the reservations expressed by the Court of Criminal Appeal about the correctness of the trial Judge's decision on this point. Indeed, on the material which was brought to the trial Judge's attention, a jury might reasonably have concluded that the appellant was not fit to be tried.

Although Dr. Walton was of the opinion that the appellant was fit to be tried, Dr. Arul's report indicated that he was of the opposite opinion. That conflict of opinion was not adequately disposed of by Dr. Arul's subsequent statement that "things may have changed" between the date of his examination of the appellant and the date of Dr. Walton's examination of the appellant. Dr. Arul's opinion as to the appellant's condition as expressed in the report was a strong one. And Dr. Walton accepted the correctness of Dr. Arul's diagnosis, that the appellant was psychotic, that his condition was unstable and had been acute a week earlier, that he was not taking his prescribed medication and that this was a matter of concern because he might become unfit in the near future within the timeframe of the trial. Moreover, Dr. Walton considered that the appellant's psychosis was such that it could flare up under stress in such a way as to render him unfit to be tried. In this situation, we consider that the issue should have been left to the jury to determine. As it was, the trial Judge decided not to empanel a Jury. In reaching that conclusion, his Honour did not advert to the possibility that the appellant's psychosis might flare up under stress during the course of what was obviously going to be a very long trial. No doubt that was because neither Dr. Walton nor Dr. Arul was asked to consider that specific question, though Dr. Walton did make reference to it.

In this respect, his Honour was in error. In the context of a trial, fitness to be tried is to be determined by reference to the factors mentioned by Smith J. in *Presser* and by reference to the length of the trial. It makes no sense to determine the question of fitness to be tried by reference to the accused's condition immediately prior to the commencement of the trial without having regard to what the accused's condition will or is likely to be during the course of the trial. There is simply no point in embarking on a lengthy trial with all the expense and inconvenience to jurors that it may entail if it is to be interrupted by reason of some manifestation or exacerbation of a debilitating condition which can affect the accused's fitness to be tried. Of course, that is not to exclude from the jury's consideration the question whether the condition is such that difficulties can be accommodated by an adjournment if and when they arise. It follows that the appellant's conviction should be quashed and a new trial ordered. Although that conclusion makes it unnecessary to examine the trial Judge's ruling which was made towards the end of the trial on 27 May, we should make some comments about it.

The trial Judge's ruling on 27 May

In our opinion, the trial Judge did not consider the appellant's fitness to be tried on 27 May and, in this respect, we do not agree with the Court of Criminal Appeal. The trial Judge did not attempt to assess the significance of the matters which had been drawn to his attention and confined his attention to what remained to be done in order to bring the trial to a conclusion, namely, the taking of exceptions to the charge, completion of the charge and the delivery of the verdict of the jury. His Honour simply disposed of the

problem by saying that the trial was virtually over so that there was nothing remaining in respect of which the appellant could make a useful contribution. His Honour clearly felt some anxiety on this score because he endeavoured to persuade the appellant's Counsel, after his retainer had been withdrawn, to consider taking exceptions to the charge as *amicus curiae*.

For our part, although the charge to the jury was almost complete, we do not consider that the appellant's fitness to be tried became an immaterial consideration. Certainly, some of the minimum standards stated by Smith J. in *Presser* were no longer relevant to the stage which the trial had reached. But it was still necessary that the appellant should understand the nature of the charges and the proceedings, understand the substantial effect of the evidence and follow the course of the rest of the proceedings. For example, it could not be said that the appellant was fit to be tried if he were unable to understand the nature of the jury's finding and the effect of a conviction. That could hardly be the case if the appellant believed, as the trial Judge had been informed, that he could influence other people including the Court proceedings.

Notwithstanding that the trial was drawing to its close, the possibility remained that the appellant might be called upon to participate in the proceedings to protect his own interests. There was the taking of exceptions to the charge, the possibility that the jury might ask questions or make requests, e.g., for transcripts of tape-recordings, and the further possibility that the jury might not be able to reach a verdict with the consequence that the Judge might be required to take some action after giving consideration to submissions from the parties.

As it happened, the trial Judge was not only aware of the note, which, it must be accepted, emanated from the appellant, but he also had heard a submission presented, at the request of the appellant, by Counsel for a co-accused. In that submission, which related to the trial Judge's charge to the jury, the appellant asserted that the Judge had attempted to pervert the course of justice. That submission concluded with a quotation:

> Knowledge is not power. Knowledge conveyed effectively that the intended recipients understand, is power.

That submission, coming on top of all the material which had accumulated since 30 January relating to the appellant's condition, was enough to indicate that the appellant's unstable psychotic condition might well have become the subject of a "flare-up" or "florid outbreak", to use the words of Dr. Walton, rendering him unfit to be tried.

Consequently, at this late stage of the trial, a serious question as to the appellant's fitness to be tried again arose, requiring the determination of a jury. Section 393(1) of the Victorian Act makes it clear that, once the trial has begun, any question of fitness to be tried is to be determined by "the jury charged with such indictment or presentment". The Commonwealth Act is silent on the matter. The determination by a jury of such a question at that stage of the trial of more than one accused obviously presents considerable problems. It may be, for instance, that evidence adduced on the question of fitness to be tried, which would otherwise have been inadmissible, will necessitate the discharge of the jury if there is a finding of fitness. Those problems were not explored in argument. But the existence of those problems serves to emphasize the need for a trial Judge at the commencement of a trial to pay very careful attention to the question, once it arises, whether an accused is fit to be tried and to ensure that the question is determined in the light of the estimated duration of the trial.

It remains for us to mention that no attempt was made to support the view expressed by the Court of Criminal Appeal that, in any event, no miscarriage of justice took place so that the proviso to s. 568 of the State Act could be applied. It is plain enough that a failure to comply with the requirements of s. 393 is not capable of remedy by recourse to the proviso of s. 568. The object of s. 393 is to ensure that a trial does not proceed in the case of an accused who is unfit to be tried; in other words, a person who is unfit to be tried should not be subjected to trial resulting in the risk of his or her conviction. The proviso is not directed to such a situation.

In the result, the appeal should be allowed, the conviction quashed and a new trial ordered.

Deane & Dawson JJ:

Subject to one matter, we agree with the reasons for judgment of Mason CJ, Toohey & Gaudron JJ. and with the order which they propose.

The one matter that we disagree with is their Honours suggestion that, in trying the question of an accused's fitness to plead or fitness to be tried, a jury may take into account the future, as well as the present condition of the accused. No doubt there is possible inconvenience and expense in embarking upon or continuing the trial of an accused who is presently fit to be tried when there is a prospect that he or she may subsequently become unfit. But to take into account the accused's prospects in that regard in deciding whether to proceed, even if it raised a question which could properly be left to the jury, would be a radical departure from accepted practice, which is to determine the accused's fitness at the time when the question arises (*Reg v. Keary* [1878] 14 Cox CC 143). That practice accords with our understanding of the law. Indeed, at common law, "there was no provision, for [an accused's] insanity at the time of plea being afterwards suggested, though there was provision for a case of subsequent insanity, at any time before execution" (See notes to *Reg v. Southey* [1865] 4 F & F 864 at 876 [176 ER 825 at 832].).

Apart from the obvious difficulty of predicting an accused's mental state when he or she is currently fit to plead and to be tried, there are other sound reasons for the practice. It is in the accused's interest that he or she be tried if possible, rather than be incarcerated without trial (indefinitely at the Governor's pleasure in the case of a Victorian offence) (Crimes Act 1958 (Vict), s. 393). Moreover, a trial need not necessarily be aborted by temporary fits of insanity during its course. An adjournment may be, and with modern treatment often is, sufficient to enable the trial to proceed. But fundamentally an accused who is fit to plead and to be tried has a right to be tried and cannot be deprived of that right by a prediction as to his or her future mental state.

We would only add a comment in relation to the situation which arose at the end of the trial in this case. The correct course for the Judge to have adopted, had the trial properly reached that stage, was to leave both the question of fitness to be tried and the question of guilt to the jury with the instruction that they should first consider the question of fitness and not proceed beyond it if they found the accused was unfit to be tried (*Reg v. Southey* [1865] 4 F & F at 876 [176 ER at 832]; *Reg v. Khallouf* [1981] VR 360 at 364).